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No. 81-1839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

v.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

On Appeal From The Supreme Court Of Minnesota

BRIEF OF KNIGHT-RIDDER NEWSPAPERS, INC., AND THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS *AMICI CURIAE*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF THE AMICI CURIAE	2
STATEMENT	4
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. The Minnesota Supreme Court Applied An Erroneous Standard Of Review	7
A. A state legislature is not entitled to exercise "broad discretion" when it enacts a tax with a singular effect on large newspapers	8
B. The reasons proferred for sustaining Minnesota's tax on newsprint and ink are insufficient to satisfy a "strict standard" of review	11
1. Need to raise revenues	12
2. Administrative convenience	15
3. Assisting small enterprises	17
II. Even If Newspapers May Be Subjected To Sales Or Use Taxes Under Limited Circumstances, The Discriminatory Use Tax Imposed Here Cannot Be Justified As Merely "Part Of A General System Of Taxation"	19
A. This use tax impermissibly imposes unique burdens on certain newspapers.	20
B. A tax on newspapers need not reach the limits of *Grosjean* in order to be unconstitutional	23
CONCLUSION	27
APPENDIX	1a

TABLE OF AUTHORITIES

	Page
CASES:	
Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959)	8,22
ASARCO Inc. v. Idaho State Tax Comm'n, ___ U.S. ___, 50 U.S.L.W. 4962 (No. 80-2015, decided June 29, 1982)	8
Austin v. New Hampshire, 420 U.S. 656 (1975)	9,10,15
Best & Co. v. Maxwell, 311 U.S. 454 (1940)	21
Buckley v. Valeo, 424 U.S. 1 (1976)	17,18,25
Carey v. Population Services International, 431 U.S. 678 (1977)	16
Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California, ___ U.S. ___, 50 U.S.L.W. 4071 (No. 80-737, decided December 14, 1981)	11,17,18
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)	8
Gitlow v. New York, 268 U.S. 652 (1925)	7
Globe Newspaper Co. v. Superior Court for the County of Norfolk, ___ U.S. ___, 50 U.S.L.W. 4759 (No. 81-611, decided June 23, 1982)	22
Grosjean v. American Press Co., 297 U.S. 233 (1936)	*passim*
Halliburton Oil Well Co. v. Reily, 373 U.S. 64 (1963)	16,21,23

	Page
Independent School District No. 99 v. Commissioner of Taxation, 297 Minn. 378, 211 N.W.2d 886 (1973)	16
Larson v. Valente, ___ U.S. ___, 50 U.S.L.W. 4411 (No. 80-1666, decided April 21, 1982)	12,16, 18,19
Leary v. United States, 395 U.S. 6 (1969)	11
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)	8
Madden v. Kentucky, 309 U.S. 83 (1940)	8,9,17
McLeod v. J.E. Dilworth Co., 322 U.S. 237 (1944)	20-21
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	16
Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981)	14
Mullaney v. Anderson, 342 U.S. 415 (1952)	15
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	13
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)	25
NAACP v. Claiborne Hardware Co., ___U.S. ___, 50 U.S.L.W. 5122 (No. 81-202, decided July 2, 1982)	11,19
National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977)	16,17,21
Railway Express Agency v. New York, 336 U.S. 106 (1949)	19
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)	14
Speiser v. Randall, 357 U.S. 513 (1958)	9,10, 12-13,18

Page

Stanley v. Illinois, 405 U.S. 645 (1972) 16

Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935) 23

Taxation With Representation of Washington v. Regan, 676 F.2d 715 (D.C. Cir.) (*en banc*), *pet. for cert. pending*, No. 81-2338 (filed June 22, 1982) 14

United States v. Lee, ___U.S. ___, 50 U.S.L.W. 4201 (No. 80-767, decided February 23, 1982) 11

Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) 8

STATUTES AND REGULATIONS:

Iowa Code Ann. § 423.1(1) (West Supp. 1981).. 4

Mich. H.B. 5626 (1982) 4

13 Minn. Code of Agency Rules, Tax S & U 409. 13

Minn. Laws 1973, ch. 650, art. XIII, §§ 1-2 13

Minn. Stat. § 297A.14 ..... *passim*

Minn. Stat. § 297A.25, subd. 1(a) 16

Minn. Stat. § 297A.25, subd. 1(i) 13

Minn. Stat. § 297A.25, subd. 1(v) 16

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Knight-Ridder Newspapers, Inc. ("Knight-Ridder"), and the American Newspaper Publishers Association ("ANPA"), respectfully submit this brief as *amici curiae.* The *amici* support appellant Minneapolis Star and Tribune Company ("Minneapolis Star") and urge the Court to reverse the decision of the Supreme Court of Minnesota, 314 N.W.2d 201 (1981).[1]

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[1] Although Knight-Ridder, as an *amicus curiae,* is not covered by Rule 28.1 of the Supreme Court Rules, it has a substantial financial stake in the outcome of this case and considers it appropriate to comply with the spirit of the Rule. Knight-Ridder has no parent corporation. Its only non-wholly-owned subsidiaries and affiliates are

(*footnote continues*)

INTERESTS OF THE AMICI CURIAE

As explained in their separate *amicus* briefs filed in support of appellant's jurisdictional statement, Knight-Ridder and the ANPA have strong, immediate interests in this case.

1. Knight-Ridder is a nationwide communications company engaged in newspaper publishing, television broadcasting, electronic distribution of news, and related enterprises. It publishes more than 35 newspapers and is one of the largest newspaper companies in the United States in terms of total weekly circulation. Newspapers owned by Knight-Ridder have a daily circulation of more than 3.6 million and a Sunday circulation of more than 4.1 million.

Knight-Ridder has a direct financial stake in the outcome of this case. Its wholly owned subsidiary, Northwest Publications, Inc., owns three daily newspapers in Minnesota: the St. Paul Pioneer Press, the St. Paul Dispatch, and the Duluth News-Tribune & Herald.[2] During the years at issue in this litigation, 1974 and 1975, Knight-Ridder's newspapers paid more than $493,000 in use taxes under the Minnesota statute being challenged by appellant Minneapolis Star, Minn. Stat. § 297A.14 (A-5

(*footnote continued*)

Southeast Paper Manufacturing Co.; TKR Cable Company; Bay Cable, Inc.; Fort Wayne Newspapers, Inc.; Fort Wayne Newspapers (a partnership); Long Beach Cablevision, Co.; and the Seattle Times Co.

ANPA is a voluntary association of newspaper publishers and does not have any affiliate corporations, other than members of the association.

[2] Until this month, Knight-Ridder printed two daily newspapers in Duluth, the morning News-Tribune and the afternoon Herald. On August 2, 1982, the two papers were merged into a single morning newspaper, reflecting a nationwide trend toward the closing of afternoon newspapers in major cities.

n.4, A-6 n.5). Those payments represented more than one-fourth of the total taxes collected from all newspapers published in the State. Knight-Ridder currently is paying the Minnesota use tax under protest, filing protective claims for refunds in the event the statute is declared unconstitutional.

2. The American Newspaper Publishers Association is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers. Those member papers account for over 90 percent of the nation's daily and Sunday newspaper circulation, and a substantial portion of the nation's weekly newspaper circulation. The newspapers published by appellant Minneapolis Star, as well as twenty-four other newspapers published throughout the State of Minnesota, are members of ANPA. Thus, the Minnesota tax on newsprint and ink at issue in this case has a direct impact on the financial health of ANPA's Minnesota members.

3. The interests of the *amici,* however, like the principles at stake, extend well beyond the sums collected under the Minnesota use tax statute. Both *amici* have a strong interest in deterring the type of discriminatory tax imposed here and in clarifying the standards governing the constitutionality of taxes imposed directly on publications and publishers.

The Minnesota tax provision, in concert with its accompanying exemptions and exclusions, places a substantial financial burden on a select few newspapers. Indeed, just two publishers—appellant Minneapolis Star and *amicus curiae* Knight-Ridder—paid $1,730,000 of the $1,830,000 collected during the two years for which there is evidence in the record, or more than 94 percent of all the taxes collected. Unless the Minnesota statute is held invalid, other States, looking for new sources of revenue,

also may enact legislation that places a discriminatory burden on a few large newspapers. Iowa already imposes a use tax on newsprint and ink, *see* Iowa Code Ann. § 423.1(1) (West Supp. 1981), and Michigan considered such legislation this past spring, *see* Mich. H.B. 5626 (1982).

Of special concern to the *amici* is the impact that the Court's decision in this case will have in clarifying the standard of review that lower courts must apply when they adjudicate challenges to taxes that focus on newspapers. Knight-Ridder, as the owner of newspapers in 16 states, and ANPA, with member papers in all 50 states, have a substantial interest in explaining why taxes directed at newspaper publishing must be subjected to "strict scrutiny" and why such taxes violate the First Amendment unless they are supported by a compelling governmental interest and are narrowly tailored to fit that interest.

STATEMENT

The two basic raw materials used to publish newspapers are newsprint (paper) and ink. Without them, a newspaper does not exist. These are the two assets Minnesota has singled out for its use tax.

Subject to an annual exclusion of $100,000 in purchases—which has the effect of exempting 97 percent of the State's newspapers from the tax—the publisher's tax burden increases proportionately with the volume of publication: the more pages in the paper, or the more copies that are printed, or the more often it is published, the greater the tax imposed on the publisher. By contrast, the tax has nothing to do with the profitability—if any — of the newspaper or with the price charged to the reader. The Minnesota tax is, in short, a levy that varies directly with the quantity of information published.

SUMMARY OF ARGUMENT

The Minnesota use tax on newsprint and ink is directly related to the amount of speech circulated by a newspaper and thus places a special burden on publishers who attempt to provide their readers with frequent editions and larger papers. The trial court found that the use tax is "a limited, special tax . . . which abridges the freedom of the press" (A-65), but the Minnesota Supreme Court reversed on the ground that the State legislature's "broad discretion" over tax matters was sufficient to justify the tax. The *amici* agree that publishing companies are subject to ordinary business regulation. The decision below, however, sustaining the use tax at issue here, applied the wrong standard of scrutiny to this tax on protected First Amendment activity, failed to appreciate the burden that the use tax places on those few large newspaper publishers subject to it, and misinterpreted this Court's teaching in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

I

A. The Minnesota Supreme Court purported to apply a "strict standard" of review in passing on the State's use tax on newsprint and ink, but the court also stated that it was deferring to the "broad discretion" of the State legislature in the area of tax classification. This deference nullified the constitutionally required standard of strict scrutiny. A legislature is entitled to "deference" to its "discretion" only when its tax enactments do not burden specific constitutional interests. When a tax does burden protected activity, no deference is appropriate and the tax can stand only if it is necessary to satisfy a compelling interest and is narrowly tailored to fit that interest.

B. The proferred justifications for imposing the use tax and for its various exemptions are insufficient to satisfy

a "strict standard" of review. The State's "compelling interest" in raising revenue is insufficient to sustain the tax under the facts of this case. If a State's general need for revenues sufficed to justify this type of tax, then taxes could be imposed on any form of First Amendment activity, yet that clearly is not permitted under this Court's precedents. The real issue is whether there is a compelling reason to tax constitutionally protected activity. Moreover, Minnesota's extensive scheme of exemptions from its sales and use taxes undermines any suggestion that a general need for revenue provides a compelling justification for this tax. The purported justifications for the exemptions—administrative convenience and a desire to assist small enterprises—are constitutionally insufficient.

II

A. The Minnesota use tax on newsprint and ink places unique burdens on a few large newspapers. Unlike most use taxes, which are intended to equalize the burden on in-state businesses and their out-of-state competitors, this use tax penalizes in-state newspapers while out-of-state newspapers are not subjected to any tax. The use tax also has the effect of burdening newspapers in a manner not shared by other businesses, and it burdens larger newspapers in a manner not shared by smaller newspapers. The discriminatory distinctions built into the Minnesota use tax strip it of any claim that it is merely a part of a neutral system of business taxation.

B. In *Grosjean v. American Press Co., supra,* this Court struck down an attempt by a State legislature to impose on a few large newspapers an unequal tax that increased in direct proportion to the extent of the newspaper's total "speech." The Minnesota use tax has this same effect: three percent of the State's newspapers pay a special levy on their newsprint and ink, with the result that

the tax increases in direct proportion to the circulation, the number of pages printed, and the frequency of publication. The decision in *Grosjean* is not limited, as the Minnesota Commissioner of Revenue has argued, to taxes that a legislature specifically intends to penalize large newspapers; rather, any tax with the pernicious effect of curtailing the circulation of a select few newspapers is impermissible. Under this Court's decision in *Grosjean*, the Minnesota use tax must fall.

ARGUMENT

I. The Minnesota Supreme Court Applied An Erroneous Standard Of Review.

The First Amendment prohibits Congress from "abridging the freedom . . . of the press." The Framers' strongest motivation in erecting this protection was to ensure that the press would be free from special taxes. *See Grosjean v. American Press Co.*, 297 U.S. 233, 245-48 (1936) (the "predominant influence" on the Framers of the First Amendment was the English experience with the use of taxes as a "mode[ ] of restraint" on newspapers). By virtue of the Fourteenth Amendment, this constitutional guarantee applies against the States. *Id.* at 243; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Sensitive to this firm constitutional policy, the vast majority of States make no attempt to tax the publication or sale of newspapers.[3]

All parties to this litigation have recognized that Minnesota's use tax on newsprint and ink touches important First Amendment interests. The Minnesota Supreme

[3] Appendix A, *infra*, summarizes the tax treatment accorded newspapers by the States. Only six States fail to exempt newspapers, at least to some extent, from their sales taxes, and only three States fail to exempt newspapers from their use taxes.

Court was obliged to acknowledge that a "strict standard . . . must be applied when protected first amendment rights may be infringed" (A-8). While nodding in that direction, however, the court actually applied a much less sensitive standard, referring twice to what it viewed as the "broad discretion as to classification possessed by a legislature in the field of taxation" (A-13; *see also* A-8) The court failed to recognize that when a tax implicates First Amendment interests, normal legislative discretion over economic affairs is entitled to less weight. The reasons proferred for the Minnesota use tax on newspapers do not satisfy the "strict standard" that must be applied.

A. A state legislature is not entitled to exercise "broad discretion" when it enacts a tax with a singular effect on large newspapers.

This Court has had frequent occasion to review the constitutionality of State tax laws, *e.g., ASARCO Inc. v. Idaho State Tax Comm'n,* ___U.S.___, 50 U.S.L.W. 4962 (No. 80-2015, decided June 29, 1982); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981); *Wisconsin v. J.C. Penney Co.,* 311 U.S. 435 (1940), and it is true, as the Minnesota Supreme Court said, that it is ordinarily permissible to defer to a State legislature's decisions regarding tax classifications. *See, e.g., Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 526 (1959); *Madden v. Kentucky,* 309 U.S. 83, 88 (1940). But that deference is proper only when "no specific federal right, apart from equal protection, is imperiled." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359 (1973). This Court has made clear that a different calculus applies when the tax places a burden on specific constitutional rights:

> "When a tax measure is challenged as an undue burden on an activity granted special

> constitutional recognition . . . the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion."

Austin v. New Hampshire, 420 U.S. 656, 662 (1975).

The Supreme Court of Minnesota failed to recognize that the First Amendment interests in this case compelled the use of the more stringent degree of inquiry called for by cases like *Austin,* which the court ignored, rather than the deferential standard of *Madden v. Kentucky, supra,* on which it relied. The importance of this difference is dramatically illustrated by comparing *Madden,* which involved a tax on purely commercial activities, with this Court's decision in *Speiser v. Randall,* 357 U.S. 513 (1958), which involved a tax program trenching on First Amendment interests.

In *Madden,* the executor of Madden's estate challenged a Kentucky law that imposed an annual ad valorem tax on bank deposits at a rate of ten cents per hundred dollars for deposits in banks located within the State, and fifty cents per hundred dollars for deposits in banks located outside Kentucky. The executor claimed that this disparate treatment violated the decedent's rights to equal protection and due process. This Court rejected the attack, saying that the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." 309 U.S. at 88. Because the executor's argument essentially was based on the wide disparity in rates—and nothing else—the Court found that he had failed to carry that burden.

In *Speiser,* by contrast, a war veteran challenged a California state law that required taxpayers seeking a property tax exemption for which they were otherwise fully qualified to sign a statement declaring that they did not advocate the unlawful overthrow of the government of

the United States or of a State. The statute thus conditioned liability for the tax on whether and how a citizen exercised his right of free speech protected under the First Amendment. Far from deferring to the California legislature's design of its tax program, the Court insisted that this type of statute be "subjected to close analysis and critical judgment." 357 U.S. at 520.

It did not matter in *Speiser* that only a tax exemption was at stake or that the statute did not prohibit or, by its terms, restrain free speech. The Court reasoned that a "discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." *Id.* at 518. It found the deterrent effect of denying a tax exemption "the same as if the State were to fine them for this speech." *Id.* Therefore, the Court concluded, when "a State's general taxing program" burdens the exercise of First Amendment rights, the Constitution "demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Id.* at 528-29.

Decisions since *Speiser* confirm that the court below erred in according "broad deference" to the Minnesota legislature's actions in constructing the challenged tax. For instance, in *Austin v. New Hampshire, supra,* 420 U.S. 656, this Court gave special scrutiny to a State's commuter tax challenged as a violation of the Privileges and Immunities Clause, which, like the First Amendment, is "granted special constitutional recognition." *Id.* at 662. The Court in *Austin* reviewed earlier Privileges and Immunities Clause decisions and concluded that these prior cases:

> "reflect an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions."

Id. at 663. *See also, e.g., United States v. Lee,* ___U.S. ___, ___, 50 U.S.L.W. 4201, 4203 (No. 80-767, decided February 23, 1982) (holding that federal tax which allegedly impinged on the free exercise of religion could only be justified "by showing that it is essential to accomplish an overriding governmental interest"); *cf. Leary v. United States,* 395 U.S. 6 (1969) (holding federal tax unconstitutional in light of Fifth Amendment privilege against self-incrimination).

As the Court repeatedly has affirmed, "regulation of First Amendment rights is *always* subject to exacting judicial review." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California,* ___U.S. ___, ___; 50 U.S.L.W. 4071, 4072 (No. 80-737, decided December 14, 1981) (emphasis added). Thus, a tax designed by its terms to fall directly on protected activity at the core of the First Amendment—the publication of a newspaper—may stand only if the State demonstrates a compelling justification for it.

B. The reasons proferred for sustaining Minnesota's tax on newsprint and ink are insufficient to satisfy a "strict standard" of review.

It is only the first step, of course, to determine that First Amendment interests are implicated by the Minnesota use tax on newsprint and ink and that a court's usual deference to a State legislature's tax classifications is displaced by a "strict standard" of review. "Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances." *NAACP v. Claiborne Hardware Co.,* ___U.S.___, 50 U.S.L.W. 5122, 5129 (No. 81-202, decided July 2, 1982). The Court recently articulated the governing standard in striking down another Minnesota statute on First Amendment grounds: the State must come

forward with a "compelling governmental interest" for its tax scheme and must demonstrate that its classifications are "closely fitted to further that interest." *Larson v. Valente*, ___U.S.___, ___, 50 U.S.L.W. 4411, 4416 (No. 80-1666, decided April 21, 1982) (striking down Minnesota law exempting some but not all religions from registration and reporting requirements).

Although the Minnesota Supreme Court did not conform its analysis with this formula, the decision below discusses three possible justifications for this use tax and its various exemptions. The sole reason identified for imposing a tax on the publishing of newspapers in the first place is the State's "compelling" need to raise revenues (A-12, 13). With respect to the specific classifications in the statute, the court suggested that the exemptions—which result in the imposition of the use tax on only three percent of the State's newspapers—may be justified by administrative convenience (A-13, 18), or by a desire "to give favorable tax treatment to smaller enterprises" (A-17). Even if one assumes that these suggestions reflect the Minnesota legislature's actual motives, these purported justifications are insufficient to meet the controlling First Amendment standards.

1. Need to raise revenues

No one doubts that the State of Minnesota has a need to raise money for State programs. But reliance on this interest as a basis for the use tax at issue proves both too much and too little.

If a State's general need to raise revenues were sufficiently "compelling," by itself, to justify taxation of constitutionally protected activity, it would be permissible to impose taxes directly on the exercise of the rights to free speech or the free exercise of religion. This Court, however, has not tolerated such efforts. *See, e.g., Speiser*

v. Randall, supra (claim for tax exemption unconstitutionally conditioned on taxpayer's disavowal of protected speech); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943) (city ordinance imposing a flat license tax on canvassers unconstitutional as applied to religious solicitors). The issue, therefore, is not whether a State has a compelling need to raise revenue, but whether the State of Minnesota has shown a compelling interest in imposing a tax *on constitutionally protected activity,* like publishing a newspaper.

Nor is the tax on newspaper publishing merely incidental. The history of this tax shows that the Minnesota legislature has dealt quite deliberately with the taxation of newspapers. When Minnesota first enacted a comprehensive scheme of sales and use taxes in 1967, it manifested sensitivity to the constitutional values at stake and included an exemption from all sales and use taxes for newspapers as well as for newsprint and ink. *See* Minn. Stat. § 297A.25, subd. 1(i) (1967).[4] In 1971, however, the legislature removed the exemption and made the purchase of paper and ink for use in printing newspapers in the State subject to the use tax. Then in 1973, the legislature amended the use-tax section, Minn. Stat. § 297A.14, to provide publishers with an exemption for the first $100,000 in paper and ink purchased and used each year. Minn. Laws 1973, ch. 650, art. XIII, §§ 1-2.

The scheme of exemptions included with Minnesota's use tax on newsprint and ink severely undermines the revenue-producing effects that it might have, and, concomitantly, weakens any argument by the State that it has a compelling need to raise revenue by taxing a select few

[4] The exemption applied to all "publications," a term defined to include newspapers and other printed periodicals published at least once every three months. *See* 13 Minn. Code of Agency Rules, Tax S&U 409, *reprinted in* Appellee's Motion to Dismiss at A-1.

newspapers. Because all of the State's newspapers receive an exemption for the first $100,000 in purchases of newsprint and ink, 97 percent of Minnesota's newspapers pay no tax at all. Moreover, no attempt is made to reach the production or sale of out-of-state newspapers, through either a use tax or a sales tax. In addition, numerous companies that use the same materials, such as those that produce textbooks, are exempt from the use tax, even though their publications also are exempt from a sales tax.

This Court has recognized that deviations from the uniform pursuit of an asserted government purpose can raise serious doubts as to the deference that should be accorded to that purpose or to the State's mode of pursuing it. *See, e.g., Metromedia, Inc. v. San Diego,* 453 U.S. 490, 520 (1981) ("exceptions to the general prohibition are of great significance in assessing the strength of the city's interest"); *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 73 n.14 (1981) ("The Borough's decision to permit live entertainment as a nonconforming use only undermines the Borough's contention that live entertainment poses inherent problems that justify its exclusion."); *see also Taxation With Representation of Washington v. Regan,* 676 F.2d 715, 738 & n.43 (D.C. Cir.) (*en banc*), *pet. for cert. pending,* No. 81-2338 (filed June 22, 1982) (government interest asserted to justify restrictions on lobbying by charitable organizations undermined by special exception for veterans' groups).

In view of these numerous exemptions, Minnesota's general need to raise revenues is not, standing alone, sufficient to sustain a tax that consciously places a substantial burden on the First Amendment activities of a select few newspapers. In this case, the Court has no occasion to consider the permissibility of taxes on constitutionally protected activities when those activities are merely included within the coverage of a facially uniform, neutral

tax, such as an income tax or a general sales tax on all products. What is at issue here is Minnesota's decision to focus its taxing powers on the raw materials of newspaper publishing and to create special, selective exemptions. The State has failed to come forward with a compelling justification for taxing newsprint and ink only when those materials are in the hands of a select few publishing companies.

2. Administrative convenience

The Minnesota Supreme Court suggested that "administrative convenience" might justify limiting the use tax to a few large newspapers. The court used this concept in two contexts: first, in explaining why the legislature may have decided to impose a use tax, borne by the publisher, rather than a sales tax, borne by the purchaser (A-13), and second, in speculating why the legislature granted an exemption that frees publishers of 97 percent of the State's newspapers from paying any use tax at all (A-17 & 18). But this surmise regarding administrative convenience fails as a justification for imposing a use tax on a few large newspapers.

First, these assertions are deficient as a matter of law, for " '[s]omething more is required than bald assertion'—by the state court or by counsel here—to establish the validity of a taxing statute that on its face discriminates." *Austin v. New Hampshire, supra,* 420 U.S. at 666 n.10 (*quoting Mullaney v. Anderson,* 342 U.S. 415, 418 (1952)). It is doubtful, of course, that such "bald assertions" can be supported with proof, but, in any event, the Minnesota Commissioner of Revenue supplied no proof that "administrative convenience" was the basis for adopting, implementing, or retaining the classifications used by the legislature.

Second, claims of administrative convenience are a dubious justification for imposing burdens on the exercise

of constitutional rights. *See, e.g., Carey v. Population Services International,* 431 U.S. 678, 691 (1977); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 263-64 (1974); *Stanley v. Illinois,* 405 U.S. 645, 656 (1972). An argument based on administrative convenience must be rejected when it does not explain how statutory classifications are "closely fitted to further that interest." *Larson v. Valente, supra,* ___U.S. at___, 50 U.S.L.W. at 4416; *cf. Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 74 nn.8 & 9 (1963). Indeed, the Minnesota Supreme Court itself has held assertions of administrative convenience to be insufficient to justify a taxing scheme that failed to account for all the necessary considerations. *See Independent School District No. 99 v. Commissioner of Taxation,* 297 Minn. 378, 386, 211 N.W.2d 886, 891 (1973).

In this instance, the interests in administrative convenience that might be served by imposing a use tax rather than a sales tax do not explain the exemption for the first $100,000 of newsprint and ink. Nor do these interests explain Minnesota's failure to extend the tax on newsprint and ink to other industrial users of these products—such as printers of food packaging and school textbooks—whose products also are exempt from a sales tax upon purchase by the ultimate consumer. *See* Minn. Stat. § 297A.25, subd. 1(a), (v). Nor does administrative convenience adequately explain why a tax is placed on in-state newspapers but not on the circulation of out-of-state newspapers.[5] Minnesota's sole response on this issue is

[5] If Minnesota, consistently with the First Amendment, may impose a use tax on newspapers within the State, the Due Process Clause would permit it to impose a comparable use tax on some out-of-state newspapers sold in the State. *See, e.g., National Geographic Society v. California Board of Equalization,* 430 U.S. 551 (1977) (sustaining California's imposition of a use tax on an out-of-state business that had a nexus with California through unrelated business activities).

(*footnote continues*)

that the State has "inherently broad powers to create classifications and grant exemptions for the purpose of 'fitting tax programs to local needs,' " Appellee's Motion to Dismiss at 22 (*quoting Madden v. Kentucky, supra,* 309 U.S. at 88). But, when the "fit" weighs unevenly on First Amendment interests, the State does *not* have "inherently broad powers."

3. Assisting small enterprises

The Minnesota Commissioner of Revenue also suggested below, and the State Supreme Court apparently agreed, that this use tax scheme might be sustained, despite its crazy quilt of exemptions, as part of "a legislative policy to give favorable tax treatment to smaller enterprises" (A-17). This Court, however, has flatly rejected the sufficiency of a similar justification for a regulation that imposes a differential impact on parties engaged in First Amendment activities. The argument has no more validity in this case.

A decision to grant "favorable treatment" to smaller newspapers necessarily constitutes a decision by the State to give "unfavorable treatment" to larger newspapers. Yet in *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court said "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49. This conclusion was reaffirmed just this past Term in *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley, California, supra,* ___U.S.___, 50 U.S.L.W. 4071. In that case, the Court quoted this same passage from

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(*footnote continued*)

The First Amendment issue was not present in *National Geographic,* because California, unlike Minnesota, expressly exempted "periodicals" from all sales and use taxes. 430 U.S. at 553 n.1.

Buckley and then proceeded to strike down a city ordinance which had been defended, in part, as a measure that would further the supposed governmental interest of ensuring that wealthy groups did not have a louder or more influential voice in the initiative process than those less affluent. 50 U.S.L.W. at 4072-74.

The Minnesota Supreme Court attempted to distinguish *Buckley* by denying that "the effect of section 297A.14 is to enhance the voice of one newspaper relative to another newspaper" (A-18). The fact is, however, that 97 percent of Minnesota's newspapers are exempted from paying any tax on newsprint and ink—thereby substantially reducing their costs for these materials—while three percent of the State's newspapers, those with larger circulations, do pay the tax. Under the Minnesota scheme, the availability of the exemption depends solely on the quantum of publishing, as measured by the volume of paper and ink used. Yet, it "cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." *Speiser v. Randall, supra,* 357 U.S. at 518.

The principle underlying *Buckley* and *Citizens Against Rent Control* is plain. When the exercise of free speech is involved, it is not the government's prerogative to favor one segment of our society over another. Thus, a State does not have a legitimate interest, much less a "compelling" one, in extending favorable tax treatment to smaller newspapers by placing the entire tax burden on newspapers with larger circulations. As the Court recently put it in *Larson v. Valente, supra,* in striking down another discriminatory Minnesota statute on First Amendment grounds, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would

impose upon a minority must be imposed generally." ___ U.S. at ___, 50 U.S.L.W. at 4416 (*quoting* Justice Jackson's concurring opinion in *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949)).

Accordingly, any State policy of favoring one group of newspapers in preference to another group can hardly be viewed as a compelling justification for the Minnesota statute. If that is the policy that animates the challenged classification, it is a blatantly impermissible form of discrimination.

* * *

When, as in this case, a statute impinges upon constitutionally protected activity, there is "a special obligation on this Court to examine critically the basis on which liability was imposed." *NAACP v. Claiborne Hardware Co., supra,* ___U.S. at ___, 50 U.S.L.W. at 5130. When measured against the constitutionally required standard of strict scrutiny, the three justifications for this statute cited by the Minnesota Supreme Court are insufficient to support the burden imposed. Consequently, the statute must fall.

II. Even If Newspapers May Be Subjected To Sales Or Use Taxes Under Limited Circumstances, The Discriminatory Use Tax Imposed Here Cannot Be Justified As Merely "Part Of A General System Of Taxation."

The appellant Minneapolis Star has argued in this case, as one ground for holding the statute invalid, that neither a general sales tax nor a general use tax may constitutionally be imposed on newspapers. The Court need not address this broad question, however, just as the Minnesota Supreme Court found that it did not have to

resolve it (A-13 n.10).[6] As shown in Appendix A, *infra*, only a few States endeavor to apply sales or use taxes to newspapers, and there is no clear pattern running through the structure of the tax systems of the States that do impose some form of tax on newspapers. Thus, it would be unwarranted to generalize about the validity of each State's approach.

The case now before the Court involves a specially crafted use tax which does not mirror a general sales tax and which contains unique, discriminatory elements. Neither of the other two States that impose a use tax on newsprint distinguishes among classes of publishers. When addressed in its own context, the Minnesota tax fails the relevant constitutional tests.

A. This use tax impermissibly imposes unique burdens on certain newspapers.

The court below asserted that the use tax on publishers of large-circulation newspapers is simply "part of a general system of sales and use taxation" (A-13). Knight-Ridder and ANPA agree that a legislature may impose on newspaper publishing companies a fair share of "ordinary forms" of general business taxes, such as nondiscriminatory taxes on net income. But easy phrases do not answer the hard question whether a specific tax—such as the use tax at issue here—is indeed "an ordinary form of taxation."

This Court's prior use-tax decisions establish that a more careful scrutiny than that provided by the court below is required in order to determine the validity of a particular tax. "A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, [and] are assessments upon different transactions. . . ." *McLeod v. J. E. Dilworth Co.*, 322

[6] If the Court were to reach this issue, *amici* would concur with appellant that a "tax on knowledge" in the form of a sales tax on newspapers is unconstitutional.

U.S. 327, 330 (1944). Thus, sales taxes and use taxes "may have to justify themselves on different constitutional grounds." *Id.*

When sales and use taxes have differential impacts on interstate commerce, the Court has said that

> " '[i]n each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' . . ."
>
> * * *
>
> "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax. . . ."

Halliburton Oil Well Co. v. Reily, supra, 373 U.S. at 69-70 (*quoting Best & Co. v. Maxwell,* 311 U.S. 454, 455-56 (1940)). Newspapers engaged in constitutionally protected speech within the State of Minnesota are entitled to no less equal treatment. They do not receive it under the Minnesota statute.

The use tax imposed on large Minnesota newspapers is quite different from the use taxes typically enacted by States and previously reviewed by this Court. In most instances, a use tax is merely "a corollary" to a sales tax system and is imposed "on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax." *National Geographic Society v. California Board of Equalization, supra,* 430 U.S. at 555. Here, however, the use tax is imposed only on large *in-state* publishers and has the effect, not of establishing parity, but of destroying it.

First, out-of-state competitors of Minnesota newspapers are not subjected to any tax, yet out-of-state competitors of other businesses in the State face tax burdens equivalent to those of their Minnesota counterparts. In essence, the equal-treatment purpose typically served by a use tax is turned on its head here, with the result that in-state publishers are penalized. Although discrimination against a State's own residents may be permissible in situations in which there are no special constitutional interests, *cf. Allied Stores of Ohio v. Bowers, supra,* 358 U.S. 522, 533-34 (1959) (Brennan, J., concurring), that result is certainly suspect when it affects the exercise of First Amendment rights. At the least, the tax imposed on a small class of Minnesota newspapers cannot be viewed as merely a neutral part of a traditional, balanced tax program.

Second, the unavoidable effect of the Minnesota use tax is to penalize efforts by a newspaper to expand its product and give readers additional pages of information for the same sales price. Those efforts would increase a newspaper's tax burden under the use tax, yet other Minnesota businesses can engage in comparable activity —providing more product, for instance, at no extra charge—without incurring any additional tax liability. With a product whose size is as variable as a newspaper, even at a constant newsstand price, this surcharge by the State penalizes publishers who want to increase the flow of information to their readers. This tax system thus has a direct and adverse effect on a newspaper's First Amendment right to engage in "the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court for the County of Norfolk,* ___U.S.___, ___, 50 U.S.L.W. 4759, 4761 (No. 81-611, decided June 23, 1982).

Third, the statute's unique $100,000 exemption disadvantages larger newspapers vis-a-vis their smaller competitors. The effective rate of tax increases as a newspaper

purchases newsprint and ink beyond its $100,000 exemption, because the exempted amount becomes an increasingly small percentage of the newspaper's total purchases. Thus, the tax violates the principles set forth in *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935), in which the Court held invalid on equal protection grounds a gross-sales tax that imposed higher tax rates on higher volumes of sales. Moreover, the statute "in its practical operation work[s] discrimination" that is impermissible "for a valid use tax." *Halliburton Oil Well Co. v. Reily*, *supra*, 373 U.S. at 69, 70. With any neutral tax, there is no similar discrimination against larger businesses.

B. A tax on newspapers need not reach the limits of *Grosjean* in order to be unconstitutional.

The Commissioner of Revenue and, to a lesser extent, the Minnesota Supreme Court, have suggested that the State's use tax on newsprint and ink should not be struck down because the tax does not evince the hostile qualities of the gross receipts tax at issue in *Grosjean v. American Press Co.*, *supra*, 297 U.S. 233. The court below sought to distinguish *Grosjean* by saying that sales and use taxes "are now commonplace and readily accepted" and for this reason differ from the gross receipts tax in *Grosjean* (A-12). Moreover, the court concluded that the Minnesota use tax statute was not enacted as a "deliberate and calculated device" to restrict circulation and is not "literally dependent upon circulation" (A-15).

The premise underlying that discussion is mistaken, however, because it assumes that a tax on newspapers is valid if it differs from the tax in *Grosjean*. As we discussed above, the Minnesota use tax does not satisfy traditional standards for testing taxes imposed on constitutionally protected activities. In addition, the reasoning of the court below trivializes *Grosjean*, transforms an aberrant extreme into a legal standard, and exalts minor factual differences

into distinctions of constitutional magnitude. Correctly understood, *Grosjean* reflects the Constitution's antipathy to taxes on newspapers.

Although *Grosjean* involved a gross receipts tax and this case involves a use tax, that difference is of no moment. Gross receipts taxes are common; the invalidity of such a tax in *Grosjean* did not rest on anything special about that type of tax. Rather, it was the application of the tax to the circulation of a few large newspapers that placed it at odds with the First Amendment. The tax fell only on publishers whose activities pushed their circulation above a certain level, and the Court held that this "direct tendency to restrict circulation" ran afoul of the First Amendment. 297 U.S. at 245-46.

The relationship between the Minnesota use tax and circulation is at least as direct as in *Grosjean*. If anything, a comparison makes the Minnesota tax more objectionable. In *Grosjean*, Louisiana's 13 largest newspapers were subjected to the special tax, while at least 124 other newspapers in the State paid no tax at all. The disparity here is at least as dramatic: 11 publishers in 1974 and 13 publishers in 1975 had to pay the Minnesota use tax, while nearly 400 other publishers were completely exempt from any tax at all. The gross receipts tax in *Grosjean* varied with the revenues received from advertising. By contrast, because the quantity of newsprint and ink consumed by a Minnesota publisher is directly related to the amount of information circulated by the publisher—as determined by the number of copies printed, the size of each newspaper, and the frequency of publication—the amount of the Minnesota tax, for those papers subject to it, is determined solely by the quantum of information a publisher is willing to disseminate.

Finally, it is true, as the court below emphasized, that this Court referred to the tax in *Grosjean* as a "deliberate

and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled. . . ." *Id.* at 250. Two points must be made, however, about that comment. First, that conclusion did not rest on an evaluation of the subjective motives of the legislature, but involved an inference that a tax that was specially crafted to be "measured alone by the extent of the circulation of the publication" necessarily manifested "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." *Id.* at 251. Because the Minnesota tax has essentially the same effect, the Minnesota legislature may be presumed to have intended the natural and predictable consequences of its statutory scheme, regardless of its actual, subjective motives.

Second, evidence of bad intent has never been a necessary condition for declaring a statute unconstitutional under the First Amendment. Although *Grosjean* is a reminder that government retaliation through discriminatory taxation is totally alien to the Free Press guarantee, overt retaliation is seldom demonstrable. The Court, therefore, has realistically and frequently focused on effect, not intent. For example, in *Buckley v. Valeo, supra,* the Court explained that the First Amendment may be violated "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly *as an unintended but inevitable result* of the government's conduct . . ." 424 U.S. at 65 (emphasis added). Similarly, in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461 (1958), the Court stated:

> "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended,* may

> inevitably follow from varied forms of governmental action. . . . Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived *to have the consequence* of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment." (Emphasis added.)

The decision in *Grosjean* was cited as support for this proposition.

Thus, the lesson of *Grosjean* transcends the specific facts of that case. What was wrong in *Grosjean*—and what is wrong in this case—is that an unequal tax has been placed on a few large newspapers, increasing in direct proportion to the extent of each newspaper's total "speech," with the inevitable tendency of curtailing that speech. It bears repeating that the sums collected under the Minnesota use tax are substantial: more than $1.2 million from the appellant Minneapolis Star during the two years at issue in this case, and more than $493,000 during that time from *amicus curiae* Knight-Ridder. These sums are completely unrelated to any income tax on the publisher's profit, if any, from publishing the papers. Thus, the use tax is simply the functional equivalent of a privilege tax for the privilege of printing a widely circulated newspaper—precisely what the Court found in *Grosjean* the Framers had intended to prohibit. *See* 297 U.S. at 245-48.

The Minnesota use tax can be sustained only if the Commissioner of Revenue satisfies his burden of proving that the tax furthers a substantial governmental interest unrelated to the curtailment of free expression and that the tax burden is narrowly tailored to serve that interest. The Commissioner of Revenue not only has not met that burden, but he cannot meet it. Accordingly, the use tax on newsprint and ink imposed by section 297A.14 of the Minnesota Statutes must be declared unconstitutional.

CONCLUSION

The decision of the Supreme Court of Minnesota should be reversed.

Respectfully submitted.

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APPENDIX

State tax codes vary widely and it is not possible to categorize the various taxes and exemptions with complete precision. In addition, revenue rulings and court decisions may affect the interpretation of the statutory language. A survey of State tax codes, however, indicates that forty-four States and the District of Columbia either exempt newspapers, at least in certain circumstances, from sales taxes or else do not impose a sales tax on any items; only six States make newspapers fully subject to sales taxes. Forty-seven States and the District of Columbia exempt newsprint from any use or consumption tax; only three States (including Minnesota) impose a use tax on newsprint.

Most of the sales tax exemptions for newspapers are set forth expressly in the various State codes. The exemptions for newsprint are sometimes provided expressly and sometimes provided as part of a general exemption for goods used or consumed in the manufacture of other goods that will be sold at retail.

STATE	SALES TAX ON NEWSPAPERS	USE TAX ON NEWSPRINT (a)
Alabama	Taxed	Exempt
Alaska	None	None
Arizona	Partially Exempt(b) (§ 42-1310.2(g))	Exempt
Arkansas	Express Exemption (§ 84-1904(f))	Exempt
California	Express Exemption (§ 6363)	Express Exemption (§ 6362)
Colorado	Express Exemption (§ 39-26-102(21))	Express Exemption (§§ 39-26-102(21); 39-26-203(i))

STATE	SALES TAX ON NEWSPAPERS	USE TAX ON NEWSPRINT (a)
Connecticut	Express Exemption (§ 12-412(f))	Exempt
Delaware	None	None
District of Columbia	Express Exemption (§ 47-2005(6))	Exempt
Florida	Express Exemption (§ 212.08(6))	Exempt
Georgia	Taxed	Exempt
Hawaii	Taxed (c) (§ 237-13(1)(A))	Taxed (c) (§ 238-2)
Idaho	Taxed	Express Exemption (§ 63-3622(x))
Illinois	Exempt (d)	Express Exemption (ch. 120 §§ 439.2, 439.32, 440)
Indiana	Express Exemption (§ 6-2.5-5-17)	Exempt
Iowa	Express Exemption (§ 422.45.9)	Taxed (§§ 422.42.3; 423.1.1)
Kansas	Taxed	Exempt
Kentucky	Taxed	Exempt (e)
Louisiana	Express Exemption (§ 47.305(4))	Exempt (f)
Maine	Express Exemption (§ 36-1760(14))	Exempt
Maryland	Express Exemption (§ 81-326(N))	Express Exemption (§ 81-326(N))
Massachusetts	Express Exemption (64H, § 6 (m))	Express Exemption (64H, § 6 (r))
Michigan	Express Exemption (§ 7.525(h))	Express Exemption (§ 7.555(4)(O))
Minnesota	Express Exemption (§ 297A.25(i))	Taxed (§ 297A.14)

STATE	SALES TAX ON NEWSPAPERS	USE TAX ON NEWSPRINT (a)
Mississippi	Express Exemption (§ 27-65-111(b))	Exempt
Missouri	Express Exemption (12 Mo. Admin. Code § 10-3.340)	Express Exemption (§ 144.030(8))
Montana	None	None
Nebraska	Express Exemption (§ 77-2704(d))	Exempt
Nevada	Express Exemption (§ 372.315)	Express Exemption (§ 372.315)
New Hampshire	None	None
New Jersey	Express Exemption (§ 54:32B-8.5)	Express Exemption (§ 54:32B-8.29)
New Mexico	Express Exemption (§ 7-9-64)	Exempt
New York	Express Exemption (Art. 28, § 1115(a)(5))	Express Exemption (Art. 28, § 1115 (a)(5))
North Carolina	Partially Exempt (g) (§ 105-164.13(28))	Exempt
North Dakota	Express Exemption (§ 57-39.2-01.2)	Express Exemption (§§ 57-39.2-04.16; 57-40.2-04.6)
Ohio	Express Exemption (§ 5739.02(B)(4))	Exempt
Oklahoma	Partially Exempt (h) (§ 68-1357(c))	Exempt
Oregon	None	None
Pennsylvania	Express Exemption (T72, § 7204(30))	Exempt
Rhode Island	Express Exemption (§ 44-18-30(B))	Exempt
South Carolina	Express Exemption (§ 12-35-550(7))	Express Exemption (§ 12-35-550(7))
South Dakota	Express Exemption (§ 10-45-12.1)	Express Exemption (§ 10-46-9)

STATE	SALES TAX ON NEWSPAPERS	USE TAX ON NEWSPRINT (a)
Tennessee	Express Exemption (§ 67-3012(c))	Exempt
Texas	Express Exemption (Tax § 151.319(a))	Express Exemption (Tax § 151.319(d))
Utah	Express Exemption (§ 59-15-4(b)(1))	Exempt
Vermont	Express Exemption (T-32, § 9741(15))	Express Exemption (T32, § 9741(15))
Virginia	Partially Exempt (i) (§ 58-441.6(k))	Exempt
Washington	Express Exemption (§ 82.08.0253)	Exempt
West Virginia	Partially Exempt (j) (§ 11-15-9(12))	Exempt
Wisconsin	Express Exemption (§ 77.54(15))	Exempt
Wyoming	Express Exemption (§ 39-6-405(a)(xxi))	Exempt

(a) Table does not include state property taxes that may be imposed on publishers' inventories of newsprint.

(b) Ariz. Rev. Stat. Ann. § 42-1310.2(g) (1980 & Supp. 1982) excludes from sales tax all revenue "retained by or credited to carriers and other vendors."

(c) The Hawaii sales tax, *see* Hawaii Rev. Stat. § 237-13(1)(A) (Supp. 1981), imposes a tax on all manufacturers equal to one-half of one percent of the value of the article produced "as shown by the gross proceeds derived from the sale thereof."

The Hawaii use tax, *see* Hawaii Rev. Stat. § 238-2 (1976), imposes on all manufacturers who import or purchase goods for use in manufacturing a tax of one-half of one percent of the purchase price. There is no specific reference in the statute to newsprint.

(d) Although the language of the Illinois statutes, *see* Ill. Rev. Stat. ch. 120, §§ 439.2, 439.32, 440 (Smith-Hurd 1974 and Supp. 1981 & Feb. 1982) does not refer specifically to the sale of newspapers, the courts apparently have interpreted the statute to exclude sales of newspapers. *See Time, Inc. v. Hulman*, 31 Ill.2d 344, 201 N.E.2d 374 (1964).

(e) Kentucky subjects newsprint to a property tax. *See* Ky. Rev. Stat. § 132.200 (1982).

(f) Inventories of newsprint are subject to the Louisiana property tax, which is placed on virtually all property within the state.

(g) Sales by carriers and street vendors are exempt from the sales tax by N.C. Gen. Stat. § 105-164.13(28) (1979 & Supp. 1982).

(h) Carrier sales and sales for less than 75 cents are exempt. Okla. Stat. titl. 69, § 1357(c) (West. 1966 and Supp. 1981 & March 1982).

(i) Only sales at newstands are taxed. *See* Va. Code § 58-441.6(k) (1974 & Supp. 1981).

(j) Newspapers delivered by route carriers are exempt from the sales tax under W. Va. Code § 11-15-9(12) (1974 & Supp. 1981).